Key Statutory Language

Tax Court Rules

Rule 30. Pleadings Allowed

There shall be a petition and an answer, and, where required under these Rules, a reply. No other pleading shall be allowed, except that the Court may permit or direct some other responsive pleading. (See Rule 173 as to small tax cases.)
TCR 30.

Rule 34(b)(4) and (5) (Standards for Petitions).

TCR 34(b)(4)—*ASSIGNMENT* OF ***ERROR***	
[The petition in a deficiency or liability action shall contain (see Form 1, Appendix I):]	"Rule 34(b)(4) requires that a petition filed in this Court contain
(4) Clear and concise assignments of each and every ***error*** which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency	clear and concise assignments of each and every error that the taxpayer alleges to have been committed by the Commissioner in the determination of the deficiencies
or liability.	and the additions to tax and/or penalties in dispute."
The assignments of error shall include issues in respect of which the burden of proof is on the Commissioner. Any issue not raised in the	PANUTHOS (7 Sep 2004) (indicates the differences). Note: PANUTHOS' opinion *is* GERBER's opinion. *See also* Fifth Circuit p.4 (18 Jul 2005) (***left out***).

assignments of error shall be deemed to be conceded. Each assignment of error shall be separately lettered. TCR 34(b)(4) (emphasis added).	
TCR 34(b)(5)—*ALLEGATION* OF *FACTS*	
[The petition in a deficiency or liability action shall contain (see Form 1, Appendix I):] (5) Clear and concise lettered statements of the ***facts*** on which the petitioner bases the assignments of error, ***except with respect to those assignments of error as to which the burden of proof is on the Commissioner.*** TCR 34(b)(5) (emphasis added).	"Rule 34(b)(5) further requires that the petition contain clear and concise lettered statements of the facts on which the taxpayer bases the assignments of error." PANUTHOS (7 Sep 2004) (indicates the differences). Note: PANUTHOS' opinion *is* GERBER's opinion.

Rule 36. Answer

(b) Form and Content: The answer shall be drawn so that it will advise the petitioner and the Court fully of the nature of the defense. It shall contain a specific admission or denial of each material allegation in the petition; however, if the Commissioner shall be without knowledge or information sufficient to form a belief as to the truth of an allegation, then the Commissioner shall so state, and such statement shall have the effect of a denial. If the Commissioner intends to qualify or to deny only a part of an allegation, then the Commissioner shall specify

so much of it as is true and shall qualify or deny only the remainder. ***In addition, the answer shall contain a clear and concise statement of every ground, together with the facts in support thereof on which the Commissioner relies and has the burden of proof.*** Paragraphs of the answer shall be designated to correspond to those of the petition to which they relate. TCR 36(b) (emphasis added).

Rule 37. Reply

(a) Time To Reply or Move: *The petitioner shall have 45 days from the date of service of the* ***answer*** *within which to file a reply, or 30 days from that date within which to move with respect to the* ***answer***. With respect to an amended answer or amendments to the answer the petitioner shall have like periods from the date of service of those papers within which to reply or move in response thereto, except as the Court may otherwise direct. TCR 37(a) (emphasis added).

Rule 40. Defenses and Objections Made By Pleading or Motion

Every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (a) Lack of jurisdiction, and ***(b)*** *failure to state a claim upon which relief can be granted.* If a pleading sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, then such party may assert at the trial any defense in law or fact to that claim for relief. ***If, on a motion asserting failure to state a claim on which relief can be granted, matters outside the pleading are to be presented, then the motion shall be treated as one for summary***

***judgment** and disposed of as provided in Rule 121, and the parties shall be given an opportunity to present all material made pertinent to a motion under Rule 121.*
TCR 40 (emphasis added).

Rule 54. Timely Filing and Joinder of Motions

Motions must be made timely, unless the Court shall permit otherwise. ***Motions shall be separately stated and not joined together***, except that motions may be joined in the following instances: (1) Motions under Rules 51 and 52 directed to the same pleading or other paper; and (2) motions under Rule 56 for the review of a jeopardy assessment and for the review of a jeopardy levy, but only if the assessment and the levy are the subject of the same written statement required by Code section 7429(a)(1).
TCR 54 (emphasis added).

Rule 121. Summary Judgment

(a) General: Either party may move, with or without supporting affidavits, for a summary adjudication in the moving party's favor upon all or any part of the legal issues in controversy. ***Such motion may be made at any time commencing 30 days after the pleadings are closed*** but within such time as not to delay the trial.
TCR 121(a) (emphasis added).

Contrast the timing language of Rule 56(b).

Rule 56. Summary Judgment
(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought ***may, at any time, move*** with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
FED. R. CIV. P. 56(b) (emphasis added).

Internal Revenue Code

Section 7459. Reports and decisions

(d) EFFECT OF DECISION DISMISSING PETITION.—*If* a petition for a redetermination of a deficiency has been filed by the taxpayer, [***then***] a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary. An order specifying such amount shall be entered in the records of the Tax Court ***unless the Tax Court cannot determine such amount from the record in the proceeding***, *or unless the dismissal is for lack of subject matter jurisdiction.*
IRC § 7459(d) (emphasis added).

Section 6673. Sanctions and costs awarded by courts

(a) Tax court proceedings

(1) Procedures instituted primarily for delay, etc.

Whenever it appears to the Tax Court that

(A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,

(B) the taxpayer's position in such proceeding is frivolous or groundless, or

(C) the taxpayer unreasonably failed to pursue available administrative remedies,

the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.

(2) Counsel's liability for excessive costs

Whenever it appears to the Tax Court that any attorney or other person admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, the Tax Court may require

(A) that such attorney or other person pay personally the excess costs, expenses, and attorneys' fees

reasonably incurred because of such conduct, or

(B) if such attorney is appearing on behalf of the Commissioner of Internal Revenue, that the United States pay such excess costs, expenses, and attorneys' fees in the same manner as such an award by a district court.

(b) Proceedings in other courts

(1) Claims under section 7433

Whenever it appears to the court that the taxpayer's position in the proceedings before the court instituted or maintained by such taxpayer under section 7433 is frivolous or groundless, the court may require the taxpayer to pay to the United States a penalty not in excess of $10,000.

(2) Collection of sanctions and costs

In any civil proceeding before any court (other than the Tax Court) which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, any monetary sanctions, penalties, or costs awarded by the court to the United States may be assessed by the Secretary and, upon notice and demand, may be collected in the same manner as a tax.

(3) Sanctions and costs awarded by a court of appeals

In connection with any appeal from a proceeding in the Tax Court or a civil proceeding described in paragraph (2), an order of a United States Court of Appeals or the Supreme Court awarding monetary sanctions, penalties or court costs to the United States may be registered in a district court upon filing a certified copy of such order and shall be enforceable as other district court judgments. Any such sanctions, penalties, or costs may be assessed by the Secretary and, upon notice and demand, may be collected in the same manner as a tax.

26 U.S.C.A. § 6673.

Citations to additional authority

For Tax Court discovery policy, *see also* TCRs 51, 70(a)(1), 90, 91 and 100.

26 U.S.C.A. § 7458 (West 2002) (*taxpayer* read also to mean *petitioner(s)*).

28 U.S.C. § 3002 (2000).

31 U.S.C. §§ 321(d), 5101, 5102, 5103 (2000).
42 U.S.C.A. § 1320b-9(k) (West 2003).

Act of October 28, 1977, Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2)).

Coinage Act of 1965, Pub. L. No. 89-81, § 211(a), 79 Stat. 254, 257 (July 23).

H.R.J. Res. 192, 73d Cong. (1933) (enacted) (Sess. I, Ch. 48, June 5) (Public Res., No. 10) (48 Stat. 112, 113 (1933)) (formerly codified at 31 U.S.C. § 463) (codified as amended at 31 U.S.C. § 5118(d)(2)).

Statement of the Case

Trial Court Jurisdiction

26 U.S.C.A. § 7442 (68A Stat. 879 (1954)).

The $1,000, "Slam-Bam, Thank You Ma'am" Case

The Tax Court ***rushed*** to judgment in this ***$1,000 case***, and the Fifth Circuit approved.

Relevant History of Tello's two "tax" cases

End of first "tax" case.

No. 05-90 (certiorari denied), is Tello's first "tax" case. On 7 July 2004, the Fifth Circuit denied mandamus. [1] On 8 July 2004, KROUPA entered "judgment" against Tello.

Start and end of second "tax" case.

On 30 June 2004, Tello filed his verified petition in this case. As of 7 September 2004, i.e., *only 69 days later*, PANUTHOS entered the second "judgment" against Tello.

Pleadings

Tello's Verified Petition.

The sole source of evidence is Tello's verified petition.

Once again, Tello denied that he owed UNITED STATES OF AMERICA anything. Once again, Tello demanded *proof* of Respondent's capacity and standing.

Respondent never rebutted Tello's verified petition.

Respondent's TCR 40/121 Motion.

COMMISSIONER responded with a TCR 40 motion to dismiss. Since Respondent included matters outside the pleadings, TCR 121 applies, turning the motion to dismiss into a motion for summary judgment. Respondent supplied no evidence in support of its motion. The sole basis asserted is their mantra: "frivolous and groundless."

Respondent's improperly joined motion***S***.

With its summary judgment motion, Respondent *joined* its motion for penalties per IRC § 6673. In Tax Court, where a *petitioner* files a combined *anything*, even if not two *motionS*, the Tax Court strike something,

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[1] *In re Tello*, No. 04-10672 (July 7, 2005 5th Cir.) (unpublished).

typically by "secret order," justifying it under TCR 54. [2] But *Respondent's* motion**S** were/are not struck. Tello's post-judgment motion to strike focused on the frivolity of Respondent's motion**S**. Tello first raised this procedural point, i.e., the improperly joined motion**S**, on appeal.

Respondent pled no affirmative claim for relief.

Not only did Respondent never submit any evidence, but also never even filed an *unsworn* Answer, much less a claim for affirmative relief.

The similar Tax Court case from Montana.

COMMISSIONER's second experiment with the TCR 40/121 response to these challenges to Respondent's capacity, standing, claims, evidence, etc., is O'Connor v. COMMISSIONER, No. 13596-04. *See* n.2 (this page).

Proceedings

GERBER's *sua sponte* DISCOVERY order!

GERBER "instantly" ordered Tello to replead, not per "notice pleading," but "with specificity." Tello declined.

GERBER set pleadings hearing in DC for Dallas case.

GERBER set his *sua sponte* DISCOVERY order, regarding pleadings, *for hearing* in **WASHINGTON, DC.**

PANUTHOS granted BOTH of Respondent's improperly joined motion**S**.

On 1 September 2004, PANUTHOS not only presided over that hearing, but also commented on Tello's absence! On 7 September 2005, with Tello's verified petition as the sole source of evidence in the Record, PANUTHOS not only dismissed Tello's verified petition, but also granted summary judgment *and* § 6673 penalties *for Respondent*.

Similar handling of Montana case.

GERBER, "slam-bam, thank you ma'am'd," the Montana case ($250,000), as well, also ***with DC hearing***.

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[2] *See, e.g.*, Stearman v. COMMISSIONER, Docket Nos. 20928-03, 15561-04 (No. 05-60521 in the 5th Cir.); Florance v. COMMISSIONER, Docket Nos. 11782-03, **18209-03L** (No. 05-60552 in the 5th Cir.); Wallis v. COMMISSIONER, Docket No. 8244-04 (still pending); O'Connor v. COMMISSIONER, Docket No. 13596-04 (No. 05-70536 in the 9th Cir.).

Argument

Remedies Requested

Vacate.

Respondent lacks standing and has disclaimed (by vituperating Tello). The TCRs apply only to Respondent's benefit; the "judgment" defies the only evidence of Record; and the judicial lawlessness has triggered *Liljeberg*.

Since PANUTHOS lacks authority to grant the trial "judgment," the "judgment" on appeal is properly vacated.

Strike Respondent's motion*S*, issue default judgment.

Respondent's improperly joined, untimely and frivolous motion*S* are properly struck. With no response of Record to the verified petition, Tello should be awarded default judgment that COMMISSIONER take nothing.

IRC § 6673 Penalties.

The *courts* owe Tello § 6673 penalties.

Discussion

Due Process, Equal Protection—Tax Court Rules

1. Does TCR 54 restrict petitioners only?

See Points 1, 2 & 10. *See also* Point 3.

The rules *they* wrote!

TCR 54 restricts joinder of *motions* to two very limited circumstances. First, TCR 51 and 52 motions may be joined. TCR 51 is for a "motion for a more definite statement." TCR 52 is for a "motion to strike." COMMISSIONER makes no remote allusion to either.

Secondly, TCR 56 motions for (A) jeopardy assessment and (B) jeopardy levy, arising from the same written statement, may be joined. There is no issue of jeopardy assessment or levy in this case, much less arising from the same statement. Therefore, TCR 56 is irrelevant.

Since neither exception is satisfied, it follows that COMMISSIONER's joined motion*S* openly defy TCR 54. The discretion in TCR 54 addresses timing, not joinder.

Due Process and Equal Protection Violations.

One of Tello's "injuries in fact" is the Tax Court's blatantly biased application of TCR 54. But, the Fifth Circuit, not phased in the slightest, openly support and encourage the Tax Court's defiance, even of its own rules.

As simply a list of examples, the following areas have Equal Protection standards:

(1) racial bias, e.g., *Johnson* (racial bias in prison segregation policy);

Grutter (law school admissions policy, "reverse discrimination");

Hopwood (law school admissions policy, "reverse discrimination");

Miller v. Johnson (race-based gerrymandering of congressional districts);

Adarand Constructors, Inc. (race-bias in government contracting);

Powers (citing *Batson*) (racial bias in preemptory strikes in jury selection);

Bakke (medical school admissions policy, "reverse discrimination");

Jones v. Mayer Co. (fair housing policy);

Loving v. Virginia (state antimiscegenation statute);

Bolling v. Sharpe (public school segregation);

Brown v. Board of Education of Topeka (disallowed statutory segregation for public facilities);

Hernandez v. Texas (regarding racial bias in preemptory strikes in jury selection);

Shelley v. Kraemer (restrictive covenants, fair housing policy);

Plessy v. Ferguson (allowed statutory segregation on railway cars);

Yick Wo (race-neutral statute enforced by unequal policy (against Chinese) violates Equal Protection);

Strauder (excluding blacks from the jury);

Dred Scott (race and citizenship);

(2) gender bias, e.g., *United States v. Virginia* (VMI's

all-male admissions policy);

J.E.B. v. Alabama ex rel. T. B. (gender bias in preemptory strikes in jury selection);

(3) age bias, e.g., *Gregory*) (state judge retirement age);

(4) sexual orientation bias, e.g., *Romer v. Evans* (striking down Colorado's Amendment 2 referendum);

Lawrence v. Texas (striking down Texas' sodomy law);

Nabozny (failure to prevent orientation-based harassment in public schools);

(5) campaign finance bias, e.g., *McConnell* (political parties *vis-à-vis* special interest groups, "soft money" v. "hard money" campaign financing regulations);

(6) right to die, e.g., *Vacco* (assisted suicide statutes);

(7) state taxation, e.g., *Gen. Motors Corp., v. Tracy* (in-state and out-of-state differential rate differences);

Nordlinger v. Hahn ("acquisition value" basis for real estate taxation system);

San Antonio Indep. Sch. Dist. v. Rodriguez (funding of public school system);

(8) mental "commitment," e.g., *Heller v. Doe* (evidentiary standard differences);

(9) evidence gathering, e.g., *Ferguson v. City of Charleston* (non-consensual blood testing of suspected drug-addict pregnant women);

(10) commercial bias, e.g., *Carolene Products Co.* (health-based restriction on commerce);

(11) malapportionment, e.g., *Reynolds v. Sims*; *Baker v. Carr*;

(12) immigration policy, e.g., *Francis v. INS* (noncitizen penalized based upon the chance timing of departure from the United States); and

(13) irrational governmental action, e.g., *Village of Willowbrook v. Olech* ("class of one" fully recognized where intentional, irrational, reproducible governmental action is involved).

Irrational, intentional governmental action.

The irrational, intentional governmental action theory

applies, and Tello is a "class of one." If he's not a "class of one," here, it's because he's a member of the class of *pro se* Tax Court petitioners. Whether Tello was singled out or is just one more *pro se* Tax Court petitioner who demands *proof* (*evidence*) of the claim against him, as well as Due Process, *cf. Miller*, 654 F.2d at 521 (the 8th Circuit discussed two cogent Due Process points: (1) neutral forum and (2) presentation of the merits of the case), and Equal Protection, Tello's "injury in fact" is the same. Per *both* the Tax Court *and* Fifth Circuit, TCR 54 restricted *Respondent's* improperly joined motion**S** not at all!

Conclusion—Two-way street.

TCR 54 restricts equally or not at all. Respondent filed improperly joined motion**S**. Yet GERBER not only *did not* strike ("unfile") those motion**S** *sua sponte*, but also *did* set the motion**S** (on the *pleadings*) for in-person *hearing*, ***in Washington, D.C.***, while simultaneously ordering Tello to produce *discovery* (facts "with specificity"), under the disguise of ordering correction to his verified petition, which needed no correcting. [3] This wholly biased, intentional, irrational action by GERBER violates TCR 54, as well as both the Due Process and Equal Protection doctrines.

Respondent's motion**S** are properly struck.

Epilog.

There being, as a matter of law, no response of Record, Tello is entitled to a default judgment.

2. Does TCR 121 restrict petitioners only?

See Points 2, 6, 7, 8, 9 & 10.

The rules *they* wrote!

TCR 121 specifically ***prohibits*** even the *filing* of summary judgment motions until "***30 days after the pleadings are closed[.]***" TCR 121 (emphasis added).

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[3] What GERBER really set for a hearing was his own TCR 52 motion, which is actually a *discovery* order. *See* Point 10.

Pleadings are not closed until there's at least an Answer, and maybe not until there's a Reply. *See* TCRs 30, 36, 37. Since Respondent never Answered, not only were the pleadings not closed at the time Respondent filed its improperly joined motion**S**, but also there most certainly was no expiration of ***30 days after*** such closure!

Their malpractice liability—being too early.

The improperly joined motion**S** were filed ***too early!***

BENFORD's frivolous, improperly joined motion**S** not only defy TCR 54, Due Process and Equal Protection, but also defy TCR 121. DOJ argues on appeal that the inclusion of KROUPA's ruling, *see* No. 05-90, did not convert the TCR 40 motion into a TCR 121 motion. There is no question that rulings are admissible per judicial notice. But such rulings *are* "matters outside the pleading," TCR 40, especially where such rulings purport to include facts not in evidence in the second case.

Conclusion—Two-way street.

The irrational, intentional governmental action theory applies. Per *both* the Tax Court *and* Fifth Circuit, TCR 121 restricted *Respondent's* untimely motion**S** not at all. Respondent filed its TCR 40/121 improperly joined motion**S** too early! But, did GERBER strike ("unfile") *sua sponte* those improperly joined motion**S** filed too early? No! Instead, regarding motion**S** addressing pleadings, in a Dallas case, he set an in-person ***hearing in Washington, D.C.!*** And, he also ordered Tello to produce *discovery*, under the disguise of ordering correction to his verified petition, which needed no correcting. This wholly biased, sanctionably incompetent, intentional, irrational action by GERBER violates TCR 121, as well as both the Due Process and Equal Protection doctrines. The TCR 40/121 motion is properly struck, for being too early. TCR 121 restricts equally or not at all.

Epilog—Part 1.

There being, as a matter of law, no response of Record, Tello is entitled to a default judgment.

Epilog—Part 2.

Regarding discovery and being "too early," GERBER is also "too early!" To look *again* at the rules *they* wrote, discovery ***can't start*** until 30 days *after* "joinder of issue."

> (2) *Time for Discovery:* Discovery shall not be commenced, without leave of Court, before the expiration of 30 days ***after joinder of issue*** (see Rule 38).

TCR 70(a)(2) (emphasis added).

"Joinder of issue" doesn't happen without an Answer! Since Respondent never Answered, GERBER's ***discovery*** "order" facially and defiantly violates TCR 70(a)(2), as well as Due Process and Equal Protection. All for $1,000.

Due Process, Equal Protection—Evidence

3. Does IRC § 7459(d) allow "no-evidence-required" judgments?

See Points 4, 5, 6 & 9. *See also* Questions 4 and 5.

No judgment stands without evidence.

Cf. FED. R. APP. P. 10(b)(2). And, no statute may ***ever*** allow otherwise.

IRC § 7459(d) has *two* sentences, not just one.

To apply only § 7459(d)'s first sentence, the Tax Court not only presume facts not in evidence, but also need not require either pleadings or evidence in order to award Respondent affirmative relief. The communists can run their systems without pleadings and evidence if they want, but, in this state, that's still illegal. Per common sense and ancient reasoning, or where that fails, per the *second* sentence, the Record ***must*** contain evidence in support of the final judgment. The first sentence does not negate the second. A judgment granting affirmative relief must find evidence of Record, and for there to be evidence, there must first be pleadings asserting such claim. Here, Machiavelli *and* the communists would be proud, for *this* judgment is supported by neither pleadings *nor* evidence!

Authority on relevant doctrines.

Regarding Due Process, see IRC § 7458; *Miller*, 654 F.2d at 521; and *Boddie*.

Regarding the direct connection between judgments and evidence, see, e.g., FED. R. APP. P. 10(b)(2).

Regarding the direct connection between evidence and pleadings, see FED. R. CIV. P. 13 (compels counterclaims), 15 (trial of issue works de facto nunc pro tunc amendment of pleadings); BOGERT §§ 170-72 (disclaimer and its effect); TCRs 30 (prohibits counterclaims), 36 (requires counterclaim via misnomer), 37 (Reply allowed/required for required misnomer counterclaim via Answer); *Dishman* (claims and defenses are *very* different); and *Janis*, 428 U.S. at 438 n.5. (in *federal* court, counterclaims used to be standard operating procedure).

Regarding burden of proof, see *Pollock I*, 157 U.S. at 553-54; TCRs 34(b)(4), 36; *White Mountain Apache*, 249 F.3d at 1370-71 (Tribe claimed breach of fiduciary duty; "United States" moved, per 12(b)(6), to dismiss; granted by trial court; reversed on appeal); *FDIC v. Barton*, 104 F.3d at 701-02; *Conkling*; *C&B Sales*; BOGERT § 50 at 102, § 871 at 156 and nn.2, 3 (where beneficiary fails to prove damages, there is no recovery).

Regarding evidence, specifically, see IRC § 6020(b) (the numerics submitted are not even subscribed, much less sworn to); *Crawford* (where there is no evidence even offered, Tello is deprived his right to cross-examine); *O'Connor* (unrebutted evidence is accepted as true); *Assoc'd Gen. Contractors*, 508 U.S. at 668-69 (unrebutted allegations accepted as true); BOGERT § 50, at 108, § 170, at 205, 207 (Proof of Acceptance or Disclaimer), § 172, at 227-28 (nunc pro tunc consequences of vilifying Tello for his demanding ***evidence***, Due Process, Equal Protection).

Conclusion.

The irrational, intentional governmental action theory applies. Nothing about § 7459(d) allows a "no-evidence-required" judgment. Thus, nothing about § 7459(d) allows

a "no-pleading-required" judgment, either.

But, based on (1) no affirmative claim for relief, (2) no evidence and (3) motion*S* that are frivolous, improperly joined and untimely, PANUTHOS entered judgment *for Respondent*. GERBER refused to correct this, and the Fifth Circuit refused to correct this.

4. Does IRC § 7459(d) allow judgments that defy the only evidence of Record?

See Points 6, 9 & 10. *See also* Questions 3 and 5.

Respondent never rebutted Tello's evidence.

Because Tello's verified petition supplies the only *evidence* in this Record, that evidence must be accepted as true. *O'Connor* (unrebutted evidence is accepted as true). *See also Assoc'd Gen. Contractors*, 508 U.S. at 668-69 (unrebutted allegations accepted as true).

The "judgments" *defy* the evidence!

Since Tello's verified petition supplies the *only* evidence in this Record, PANUTHOS, GERBER, and the Fifth Circuit openly defy the law in order to render the "judgments" that exist in this case.

Conclusion.

PANUTHOS' fact-finding is clearly erroneous. The irrational, intentional governmental action theory applies. A "judgment" that ***defies*** the evidence is at least as repugnant as one based on "no evidence." Nothing about § 7459(d) tolerates either type.

STATUTORY CHALLENGE

5. If either is Yes, does IRC § 7459(d) violate Due Process?

See Point 7. *See also* Questions 3 and 4.

Due Process compels evidence.

It's legally impossible for any judgment to stand without evidence. *Any* statute that purports to suggest otherwise violates Due Process and is void on its face.

The problem is not with § 7459(d).

There is no problem with § 7459(d). The problem is with the sanctionably incompetent perversion and corruption made of it by the Tax Court and by the Fifth Circuit. On the one hand, perfectly legitimate statutes that are abused by those who implement them ruin the statutes. *Accord Yick Wo* (race-neutral statute enforced by unequal policy (against Chinese) violates Equal Protection). But, on the other, where the statute may be construed for purposes of guidance, that's preferred.

Due Process—Ethics, Sanctions

6. Should GERBER and PANUTHOS have self-recused? If so, is *Liljeberg* satisfied?

See Points 8 & 10.

GERBER should have self-recused.

No one is lawfully compelled to trial in a kangaroo court. 28 U.S.C.A. § 455(a). GERBER proclaimed his bias and his proclivity toward lawlessness in these ways:

- He failed to strike, instantly, *Respondent's* improperly joined motion***S***, filed in repugnant defiance of TCR 54. Had *Tello* submitted joined motion***S***, or joined anything***S***, GERBER would most certainly have struck it/them, instantly (and likely by "secret ruling;" *see Ballard*).
- He failed to deny, instantly, *Respondent's* untimely (too early) TCR 40/121 motion, filed in repugnant defiance of TCR 121, which prohibits even the *filing* of such motion until 30 days after the pleadings close, which doesn't happen without an Answer, and Respondent never Answered.
- He issued his own TCR 52 motion/"order" against Tello's perfectly acceptable verified petition, in repugnant defiance of TCR 34(b)(4) and (5).
- The TCR 52 motion/"order" he issued is, in reality, a ***discovery*** order, requiring presentation of facts "with specificity," in defiance of the policy of "notice

pleading," which Tello had more than satisfied.

- The TCR 52 motion/"order" he issued also repugnantly defies TCR 70(a)(2), in that ***discovery*** doesn't even ***start*** until 30 days after "joinder of issue." "Joinder" most certainly doesn't happen without an Answer, which Respondent never filed.
- ***For a $1,000, Dallas case***, he set, in repugnant defiance of TCRs 34(b)(4), (5), 36, 37, 40, 52, 54, 70(a)(2) and 121, his TCR 52 motion/"order," which regards a ***pleadings issue,*** for an ***in-person hearing, in Washington, D.C.***
- He denied Tello's post-judgment motion to strike Respondent's frivolous motion**S**.
- Despite Tello's IRC § 7460 motion, he refused to correct PANUTHOS' law-defying, Due-Process-hating "judgment" in the 30 days that the court have to review rulings by special trial "judges."
- He has so defied his oath of office, the ancient law of this state, "his own" rules, Due Process and Equal Protection as to multiply vexatiously and with scienter this litigation.

PANUTHOS should have self-recused.

No one is lawfully compelled to trial in a kangaroo court. 28 U.S.C. § 455(a). PANUTHOS proclaimed his bias and his proclivity toward lawlessness in these ways:

- Instead of striking, instantly, *Respondent's* improperly joined motion**S**, filed in repugnant defiance of TCR 54, he presided over the in-person, ***Washington, D.C.***, hearing GERBER set.
- Instead of denying, instantly, *Respondent's* untimely (too early) TCR 40/121 motion, filed in repugnant defiance of TCR 121, he presided over the in-person, ***Washington, D.C.***, hearing GERBER set.
- In light of Tello's perfectly acceptable verified petition, instead of postponing or rescheduling the in-person, ***Washington, D.C.***, hearing GERBER

set in repugnant defiance of TCRs 34(b)(4), (5), 36, 37, 40, 52, 54, 70(a)(2) and 121, he obeyed that illegal order, presided over that hearing, and then affirmatively remarked about *Tello's absence!*

- He granted ***both*** of Respondent's frivolous, improperly joined, untimely, no-pleading-required, no-evidence-required motion**S**, in flagrant defiance of, among other authority, TCRs 34(b)(4), (5), 36, 37, 40, 52, 54, 70(a)(2) and 121, IRC § 6673, Due Process and Equal Protection.
- That includes the ***sanctions*** against Tello for Tello's demanding *proof* of Respondent's capacity, standing and claims, which claims were never even pled, much less proved.
- He has so defied his oath of office, the ancient law of this state, "his own" rules, Due Process and Equal Protection as to multiply vexatiously and with scienter this litigation.

Liljeberg is satisfied.

A reasonably objective person can conclude that any "judge" who violates "his own" rules, Due Process and Equal Protection, and then ***sanctions*** litigants who assert the very *same* law to which that "judge" swore an oath, is sufficiently partial to be disqualified from that case. Where recusal should have happened, but didn't, the decision to vacate analyzes these three factors:

- "the risk of injustice to the parties in the particular case[;]"
- "the risk that the denial of relief will produce injustice in other cases[;] and"
- "the risk of undermining the public's confidence in the judicial process."

Liljeberg, 486 U.S. at 864.

RISK OF INJUSTICE TO TELLO.

The risk of injustice is high to ***any*** party where the "judge" bends over backwards to defy all law in sight in order to rule against that party. To ***sanction*** a party for

arguing the law is to defy, sanctionably, judicial ethics considerations, and to introduce still another body of law. Where any "judge" characterizes the law, itself, as "*frivolous and groundless,*" risk of injustice screams from the page.

RISK OF INJUSTICE IN OTHER CASES.

Injustice in another case via this exact same approach has already occurred. *See* O'Connor v. COMMISSIONER, Docket No. 13596-04 (9th Cir. No. 05-70536). Further, where a "judge" ***sanctions*** a party ***for arguing the law***, it's ***impossible*** for that not to affect other cases. In addition, there are now two (more) sets of Record-butchering, "sanction them who argue the law" cases, of even greater severity, pending in the Fifth Circuit. [4]

RISK OF UNDERMINING PUBLIC CONFIDENCE IN JUDICIAL PROCESS.

Tello expects that few things are more horrific to the American people than "judges" who are so biased and malicious that they overtly violate their court's very own rules, slander the law, generally, by sanctioning those who argue the law, and defy Due Process and Equal protection openly ("Stop us if you think you can!").

Conclusion.

GERBER and PANUTHOS should have self-recused, and didn't. The *Liljeberg* standard is more than satisfied. The "final judgment" is properly vacated.

7. How do the Tax Court and the Fifth Circuit avoid paying Tello penalties per § 6673?

See Point 10.

Pro Se's, the excluded class of litigants.

What's good for the goose is good for the gander.

WHO—ALL BAD ACTORS.

Train car loads of "penalties" exist to "correct" the

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[4] *See* n.2. *supra*.

"wayward" "taxpayer." Virtually nothing exists to correct systemic abuse by the Secretary, *see* IRC § 7430, and even less exists to correct systemic abuse by the trial and appellate courts. The "remedies" that *do* exist are connected with "attorneys fees," *see, e.g.*, § 6673(a)(2)(B), leaving the entire class of *pro se* litigants without an effective remedy, and that in a dispute-resolution system *designed entirely around the pro se litigant*. On its own, the Equal Protection problem manifestly declares itself.

It is impossible to conceive that congressional policy would be (A) to *create* a biased forum, in whole, much less in part by deliberately singling out an entire class of litigants, the *pro se*'s, for special, Due-Process-defying, treatment, much less (B) to deny sanctions, *especially* in the face of irrational, intentional, reproducible, unequal governmental action and conduct. Therefore, it follows that the congressional policy is to penalize the *conduct* proscribed, *including* that conduct where a "jurist" is the principal. *Cf.* § 6673(a)(2) ("any attorney or other person admitted to practice law before the Tax Court").

WHAT—ALL VEXATIOUS MULTIPLICATION OF PROCEEDINGS.

The conduct at issue is vexatious multiplication of the proceedings. *Cf.* 28 U.S.C. § 1927. Lawless (defiance of the law under color can be viewed no other way) judicial activity vexatiously multiples the proceedings, thereby bringing such activity within § 6673. We're ***way*** beyond "debatable" on these issues. The judicial "officers" are not simply errant, or simply abusing reasoned discretion. Despite ***all*** of Tello's good faith, due diligence ***and*** full disclosure, they are flat out victimizing Tello, in defiance of every applicable procedural and substantive law in sight. This tends to reinforce Tello's reading of § 6673, namely that it limits only a *"taxpayer's"* upper limit to $25,000, not the Secretary's, not DOJ's, and not any "jurist's," regarding which upper limit § 6673 is silent. For them, the penalty is competently limited by

"punishment that fits the conduct."

Equalize the playing field.

If Tello is subject to a financial hammer for being "frivolous and groundless," then how do the "jurists" who victimize Tello by *their* "frivolous and groundless" rulings avoid that same hammer? Where economic/financial measures are found suitable to bring the (falsely) *accused* into awareness of the law, are such measures not just as suitable to bring the *court* into awareness? Where the ABA-approved curriculums, and licensing exam programs, and the CLE programs *and* the trial and appellate courts, compel the *pro se* to supplement this Court's continuing legal education program, those CLE hours are not "free of charge," for they are not sponsored by any bar association.

GERBER and PANUTHOS, *and* the Fifth Circuit panel, have ***all*** vexatiously and unreasonably multiplied these proceedings. In addition to a "tax" bill of $0, Tello is entitled to § 6673 penalties from GERBER, from PANUTHOS and from the Fifth Circuit, in the amount of the total amount "ordered" due, plus interest, *plus* a minimum of $10,000 per level of litigation (this is the third level) whether individually, or jointly and severally with each "bad actor," including UNITED STATES OF AMERICA.

Conclusion.

The present legislative policies violate Equal Protection. There are no penalty provisions protecting *pro se*'s who are victimized by "frivolous and groundless" "jurists." However, § 6673 does apply for "tax" cases. Lawlessness stops when that's more expensive than following the law.

Conclusion

The Fifth Circuit have upheld the Tax Court's "judgment," which (A) defies the evidence, (B) defies the substantive law of this state, (C) butchers Due Process, (D) eviscerates Equal Protection, (E) runs over roughshod *multiple* TCRs, and (F) mocks, generally, the entire trial and appellate process. The Tax Court's manifest deviation from the law, inexorably intertwined with the flagrant violation of oath to uphold the law of this state, is only amplified by its ad-hominem-laced attitude, perspective and demeanor against *pro se*'s, especially those who demand *evidence* ***and*** application of *the law*. The trial and appellate "jurists' " ethically sanctionable departure into fantasy, overtly and desperately "supported" by phantom citations to non-existent authority (purportedly holding that " 'taxpayer' means 'fiduciary' " has ***repeatedly*** been declared "frivolous and groundless"), conflicts with (1) the truth, (2) the ancient Common Law and additional foundational law of this state, (3) longstanding federal statutory provisions, (4) relevant decisions of this Court, (5) relevant decisions of other courts of appeals and even (6) its own precedent.

Whether TCR 54 restricts petitioners only is an important question of federal law that has not been, but should be, decided by this Court.

Whether TCR 121 restricts petitioners only is an important question of federal law that has not been, but should be, decided by this Court.

By upholding the Tax Court's "judgment," in favor of Respondent, which is a no-pleading-required, no-evidence-required, TCRs-don't-matter, Due-Process-doesn't-matter, Equal-Protection-doesn't-matter "judgment," referring to "authority" that doesn't exist, the Fifth Circuit (1) have engaged in ethically sanctionable conduct, (2) have entered an opinion that conflicts with the very foundation of this state, generally, and the "tax" system, in

particular, (3) have entered an opinion that overtly and egregiously conflicts with relevant decisions of this Court, as well as with relevant decisions of other courts of appeals and even with its own, and (4) have so far departed from the accepted and usual course of judicial proceedings, and has sanctioned (i.e., encouraged) the same departure by the Tax Court, as to call for the exercise of this Court's supervisory power.

Whether IRC § 7459(d) allows a no-evidence-required "judgment," or a "judgment" that manifestly goes against the great weight of the evidence, thus openly violates Due Process, is an important question of federal law that has not been, but should be, decided by this Court.

Whether the Tax Court's and Fifth Circuit's Due-Process-defying construction of IRC § 7459(d), which statute is clear enough, ruins the statute anyway, is an important question of federal law that has not been, but should be, decided by this Court.

By supporting, and refusing to correct, the *plethora* of errant judicial activity and rulings by both GERBER and PANUTHOS in this $1,000 case, thus by not applying § 455(a) to GERBER and to PANUTHOS, thus by not applying *Liljeberg*, thereby overtly *approving* the GERBER/PANUTHOS kangaroo court, the Fifth Circuit have (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and have sanctioned (manifestly encouraged) the same departure by the Tax Court, as to call for the exercise of this Court's supervisory power.

And, whether federal trial and appellate "jurists" are liable under IRC § 6673 to litigants for judicially-spawned vexatious multiplication of "tax" proceedings is an important question of federal law that has not been, but should be, decided by this Court.

Remedies Requested

Tello requests,

1. That this Court grant the petition, issue the writ of certiorari and take jurisdiction of this matter.
2. That the "judgment" on appeal be vacated; ultimately, that the trial court "judgment" be vacated; that Respondent's motion*S* be struck, and that default judgment be entered for Tello.
3. A declaration that TCRs 54 and 121 restrict both sides equally or apply not at all.
4. A declaration that IRC § 7459(d) does not allow any no-evidence-required "judgments," or any "judgments" that defy the great weight of evidence.
5. A declaration that judicial reference to non-existent "authority" is still ***sanctionable***.
6. A ruling that GERBER and PANUTHOS should have self-recused, and that per *Liljeberg* the "judgment" is vacated.
7. IRC § 6673 penalties in his favor, *from the courts*.
8. The opportunity to brief any additional issues the Court identifies for such.
9. The non-argument calendar. Oral argument is not expected to aid the resolution of these issues.
10. That costs be taxed to the Tax Court and Fifth Circuit. And,
11. Any and all other relief at law, in equity or sui generis to which he may show himself justly entitled.

Respectfully submitted,

John Tello
P.O. Box 870983
Mesquite, Texas 75187

Appendix A
Table of Contents

Rule 14.1(i)(i)—Appellate Opinion

2005 Jul 18

United States Court of Appeals
Fifth Circuit
F I L E D
July 18, 2005
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-61146
Summary Calendar

JOHN TELLO
Petitioner – Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent – Appellee.

Appeal from a Decision of the United States Tax Court
No. 11336-04

Before KING, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.
PER CURIAM:[1]

Petitioner-Appellant John Tello contested a notice of deficiency he received regarding his 2002 taxes. The United States Tax Court dismissed his petition for failure to state a claim and imposed sanctions. We AFFIRM.

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[1] [* in original]. Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. BACKGROUND

On June 30, 2004, Petitioner-Appellant John Tello filed a pro se petition for redetermination with the United States Tax [⊥2] Court, contesting a notice of deficiency for 2002 sent to him by Respondent-Appellee Commissioner of Internal Revenue (the "CIR") In his petition, Tello alleged, inter alia, that the notice of deficiency was levied improperly because: (1) the accounting method the CIR employed was not as suitable as Tello's preferred accounting method; (2) the CIR is not permitted to provide accounting services in the State of Texas; (3) the CIR is not permitted to practice law in the State of Texas; and (4) Tello has no "fiduciary obligation" to pay taxes to the Internal Revenue Service (the "IRS") or the CIR. Notably, Tello did not deny receiving the income stated in the notice of deficiency.

On July 23, 2004, the CIR filed a motion to dismiss, arguing that Tello failed to state a claim. The CIR also moved for sanctions against Tello under I.R.C. § 6673 (2000) for instituting a proceeding for the purposes of delay and/or for making frivolous arguments in his petition for redetermination. The CIR noted that in another case involving Tello's tax deficiencies for the 1996, 1997, 1998, and 2000 tax years, Tello was informed that his fiduciary argument was frivolous and that he was sanctioned $2,500 for continuing to advance the argument.[2] In response to the CIR's motion, the Tax Court ordered Tello to "file with the Court an amended petition [setting] forth with [⊥3] specificity each error he alleges was made by the respondent in the determination of the deficiency ...." Tello in turn filed a bellicose

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[2] [n.1 in original.] This court recently affirmed the Tax Court's decision against Tello in this related case. Tello v. Comm'r, __ F.3d __, 2005 WL 1269579 (5th Cir. 2005) (per curiam).

response in which he did not set forth with specificity any alleged errors made by the CIR in calculating Tello's notice of deficiency. On September 7, 2004, the Tax Court issued an order in which it dismissed Tello's petition for redetermination, upheld the CIR's determination of deficiency, and sanctioned Tello $500 under § 6673.

On November 26, 2004, Tello filed a notice of appeal. Tello, proceeding pro se, argues that the Tax Court: (1) denied him due process in dismissing his petition; and (2) levied sanctions against him inappropriately. The CIR has moved for additional sanctions of $6,000 against Tello for maintaining a frivolous appeal. The CIR claims that on appeal, Tello has renewed his fiduciary argument, which repeatedly has been ruled frivolous. [3] Citing, inter alia, Trowbridge v. Commissioner, 378 F.3d 432 (5th Cir. 2004) (per curiam) and Parker v. Commissioner, 117 F.3d 785 (5th Cir. 1997) (per curiam), the CIR notes that we have repeatedly sanctioned taxpayers for persisting in making frivolous tax-protest arguments on appeal.

II. DISCUSSION

A. Dismissal for Failure to State a Claim

Tello's main argument on appeal seems to be that the Tax Court denied him due process and committed various other [⊥4] procedural improprieties in dismissing his petition. To the extent Tello's arguments are comprehensible, they are wholly without merit. "We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." Crain v. Comm'r, 737 F.2d 1417, 1417 [4] (5th Cir. 1984).

It is clear that Tello's petition was the proper subject of a dismissal for failure to state a claim. Petitions in the Tax Court are governed by TAX CT. R. 34(b)(4), which

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[3] *But cf. Pollock I.* Citing false authority is ***sanctionable!***

[4] As such in original.

states that a petition must contain: "Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency or liability ... Any issue not raised in the assignments of error shall be deemed to be conceded." The assignments of error Tello made in his petition for redetermination were patently frivolous. The heart of Tello's argument in the Tax Court was that the CIR has no authority to collect tax revenue. It is manifest that the CIR and the IRS have the authority to collect tax revenue by virtue of the Internal Revenue Code. See I.R.C. § 7801-7804 (2000). Thus, his primary assignment of error was plainly without merit. Furthermore, it is evident that by virtue of promulgating official tax documents, the CIR has not engaged in the unauthorized practice of accounting or law. We have previously upheld the Tax Court's dismissal of petitions for [15] redetermination under Rule 34(b)(5) for failure "to allege any justiciable error in the determinations upon which the notice of deficiency was based or any facts tending to support any such error." Sochia v. Comm'r, 23 F.3d 941, 943 (5th Cir. 1994). Accordingly, we affirm the Tax Court's dismissal of Tello's petition for redetermination.

B. Tax Court Sanctions

Section 6673(a)(1) of the Internal Revenue Code provides for sanctions up to $25,000 when a taxpayer initiates a proceeding primarily for delay or advocates frivolous or groundless arguments. "The Tax Court's assessment of penalties under section 6673 can be reversed by this court only for an abuse of discretion." Sandvall v. Comm'r, 898 F.2d 455, 459 (5th Cir. 1990). In the instant case we see no abuse of discretion. We have previously upheld penalties under § 6673 where taxpayers were warned by the Tax Court to stop litigating frivolous issues. Id. Here, Tello received multiple warnings

regarding his fiduciary argument. He chose to ignore those warnings and persisted in advocating frivolous arguments. Accordingly, we affirm the Tax Court's sanctions.

C. Appellate Sanctions

Section 7482(c)(4) of the Internal Revenue Code endows this court with "the power to require the taxpayer to pay to the United States a penalty in any case where the decision of the Tax [⊥6] Court is affirmed and ... the taxpayer's position in the appeal is frivolous or groundless." It is clear that the due process and other procedural arguments Tello makes on appeal are frivolous and groundless. We thus find that appellate sanctions are appropriate, and assess sanctions against Tello in the amount of $2,500.

III. CONCLUSION

For the foregoing reasons, the Tax Court's judgment and imposition of sanctions is AFFIRMED. The CIR's motion for sanctions is GRANTED IN PART, and sanctions in the amount of $2,500 are ASSESSED against Tello.

Rule 14.1(i)(ii)—Additional Orders

2004 Sep 7—Order of Dismissal and Decision

008 *C. A. V. - Panuthos*

UNITED STATES TAX COURT
Washington, D.C. 20217

JOHN TELLO	)	
Petitioners	)	
v.	)	Docket No. 11336-04.
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent	)	

ORDER OF DISMISSAL AND DECISION

On June 8, 2004, respondent issued a notice of deficiency to petitioner determining a deficiency in and an addition to his Federal income tax for 2002. (Section references are to the Internal Revenue Code, as amended, and Rule references are to the Tax Court Rules of Practice and Procedure.) Respondent determined that petitioner failed to report nonemployee compensation and interest income as reported to respondent by third-party payors.

Petitioner filed with the Court a timely petition for redetermination contesting the above-referenced notice of deficiency. The petition includes allegations that: (1) The Secretary is not authorized to render accounting or legal advice in the State of Texas; (2) petitioner has no "fiduciary obligation" to the Secretary or the IRS; and (3) petitioner has no legal obligation to report his tax liability to the IRS. At the time the petition was filed, petitioner resided in Mesquite, Texas.

Respondent filed a Motion to Dismiss For Failure to State a Claim Upon Which Relief Can be Granted and for Damages Under I.R.C. § 6673. By Order dated July 26, 2004, petitioner was directed to file a proper amended petition setting forth with specificity each error allegedly made by respondent in the determination of the deficiency and separate statements of every fact upon which the assignments of error are based.

Petitioner failed to file a proper amended petition. On August 27, 2004, petitioner filed a Response to respondent's motion. Petitioner's Response contains nothing but frivolous and groundless arguments.

SERVED SEP 7 2004

[⊥2] This matter was called for hearing at the Court's motions session held in Washington, D.C., on September 1, 2004. Counsel for respondent appeared at the hearing and presented argument in support of respondent's

motion to dismiss. [5] No appearance was entered by or on behalf of petitioner at the hearing.

Rule 34(b)(4) requires that a petition filed in this Court contain clear and concise assignments of each and every error that the taxpayer alleges to have been committed by the Commissioner in the determination of the deficiencies and the additions to tax and/or penalties in dispute. Rule 34(b)(5) further requires that the petition contain clear and concise lettered statements of the facts on which the taxpayer bases the assignments of error. See Jarvis v. Commissioner, 78 T.C. 646, 658 (1982).

The petition filed in this case does not satisfy the requirements of Rule 34(b)(4) and (5). There is neither assignment of error nor allegation of fact in support of any justiciable claim. Rather, the petition contains nothing but frivolous and groundless arguments. Under the circumstances, we see no need to catalog petitioner's arguments and painstakingly address them. As the Court of Appeals for the Fifth Circuit has remarked: "We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." Crain v. Commissioner, 737 F.2d 1417 (5th Cir. 1984).

Because the petition fails to state a claim upon which relief can be granted, we will grant respondent's motion

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[5] [n.1 in original.] During the hearing, counsel for respondent conceded that the amount of the addition to tax under sec. 6651(a)(1) listed on the cover page of the notice of deficiency was overstated inasmuch as it also included an amount for an addition to tax under sec. 6651(a)(2). Respondent conceded that petitioner is not liable for the latter addition to tax for 2002. The correct amount of the addition to tax under sec. 6651(a)(1) is $165.83.

insofar as respondent requests that the case be dismissed. See Schering v. Commissioner, 747 F.2d 478 (8th Cir. 1984); Rules 34(a)(1), 123(b).

Respondent also moves for the imposition of a penalty on petitioner pursuant to section 6673(a)(1). Section 6673(a)(1) authorizes the Tax Court to require a taxpayer to pay to the United States a penalty not in excess of $25,000 whenever it [13] appears that proceedings have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceeding is frivolous or groundless. Petitioner is no stranger to the Court. On July 8, 2004, the Court entered an Order of Dismissal and Decision against petitioner at docket No. 19480-02. In conjunction with the dismissal of that case, the Court imposed a penalty on petitioner in the amount of $2,500 under section 6673. Based upon the record presented in this case, we are convinced that petitioner instituted and maintained this proceeding primarily for delay. Moreover, petitioner's position in this case is frivolous and groundless. Accordingly, we will grant respondent's motion insofar as respondent moves for the imposition of a penalty upon petitioner pursuant to section 6673(a)(1).

Upon due consideration and for cause, it is hereby

ORDERED: That respondent's Motion to Dismiss For Failure to State a Claim Upon Which Relief Can be Granted and for Damages Under I.R.C. § 6673, filed July 23, 2004, is granted in that this case is dismissed on the ground that the petition failed to state a claim upon which relief can be granted. It is further

ORDERED AND DECIDED: That respondent's Motion to Dismiss For Failure to State a Claim Upon Which Relief Can be Granted and for Damages Under I.R.C. § 6673, filed July 23, 2004, is granted in that petitioner is liable for a penalty pursuant to section 6673(a)(1) in the amount of $500. It is further

ORDERED AND DECIDED: That petitioner is liable for a deficiency of $738 in Federal income tax for 2002 and an addition to tax under section 6651(a)(1) in the amount of $165.83.

/s/ Peter J. Panuthos
Peter J. Panuthos
Chief Special Trial Judge

ENTERED: SEP 7 2004

2004 Jul 26—Order Setting Hearing

004 *Nai - Dallas*

UNITED STATES TAX COURT
Washington, D.C. 20217

JOHN TELLO	)	
Petitioners	)	
v.	)	Docket No. 11336-04.
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent	)	

ORDER

Upon due consideration of the respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and For Damages Under I.R.C. § 6673, filed July 23, 2004, and for cause, it is

ORDERED that the petitioner shall on or before August 23, 2004, file with the Court an amended petition in which he sets forth with specificity each error he alleges was made by the respondent in the determination of the deficiency and separate statements of every fact upon which petitioner bases the assignment of each error. It is further

ORDERED that the respondent's motion to dismiss is calendared for hearing at the Motions Session commencing at 10:00 a.m., on September 1, 2004, in United States Tax Court, Tax Court Courtroom, Third Floor, 400 Second Street, N.W., Washington, D.C. 20217. This Order constitutes official notice to the parties.

The parties are reminded of the applicability of Tax Court Rule 50(c), which provides for the submission of a written statement in lieu of, or in addition to, attendance at the hearing.

In order that the hearings be scheduled as efficiently as possible, if either party believes that the hearing will extend beyond 30 minutes, that party shall so notify the Clerk of the Court by letter or by telephone at least 48 hours in advance of the Motions Session.

SERVED SEP 7 2004

[12]
JOHN TELLO
DOCKET NO. 11336-04

Any document submitted to the Court should reflect in bold print immediately beneath the docket number that it relates to the "Motions Session" of the Court and the date of said session.

/s/ Joel Gerber
Joel Gerber
Chief Judge

Dated: Washington, D.C.
July 26, 2004

Rule 14.1(i)(iii)—Any Rehearing
No rehearing sought or granted.

Rule 14.1(i)(iv)—Any Judgment of different date
No judgment of date different from the opinion.

Rule 14.1(i)(v)—Statutes and Rules
See language included in the petition.

Rule 14.1(i)(vi)—Additional Essential Materials

2004 Jul 23—Respondent's MotionS (p.1)

[Note: This is pg. 1 (of 6 pgs., with Cert. of Serv.).]

003 *NAI—Dallas, TX*
ORIGINAL

U.S. TAX COURT
FILED
JUL 23 2004

UNITED STATES TAX COURT

JOHN TELLO,	)	
Petitioners,	)	
v.	)	Docket No. 11336-04
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent.	)	

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND FOR DAMAGES UNDER I.R.C. § 6673

THE RESPONDENT MOVES, pursuant to Rule 40 of the Rules of Practice and Procedure of the United States Tax Court, that the above-entitled case be dismissed for

failure to state a claim upon which relief can be granted, and that the Court find in its order that there is a deficiency and an addition to tax due from petitioner, as set forth in the statutory notice of deficiency dated June 8, 2004, as follows:

Year	Deficiency	Addition to Tax Under I.R.C. § 6651(a)(1)
2002	$ 738.00	$ 213.73

THE RESPONDENT FURTHER MOVES that this Court award damages to the United States in an appropriate amount, pursuant to I.R.C. § 6673, based upon the fact that petitioner has instituted these proceedings primarily for the purpose of delay and/or petitioner's position in this case is frivolous or groundless.